MINGLING OF WATERS

RIVERS are sometimes artificially joined by building a conduit near the head of one of them and conducting its flow across the divide into the other. A mill situated upon the divide and run by water power will serve as an illustration, although the situation arises more commonly in irrigation projects, mining enterprises, and the establishment of electric power plants. The water is received by a conduit from the first river, and, after passing over the mill wheels or being used at the mine or draining from irrigated hillsides or leaving the power plant, discharges into the second river, possibly increasing the second river to several times its former volume. The rights and obligations of the party bringing this about, and his relations to lower parties on the second river, involve questions whose difficulty has been more than once referred to, and it is not supposed that this paper says all that can be said, but only that it offers an analysis which may be somewhere near right.

I

A natural stream such as First River is a natural body of water. A water-right therein such as this party's is a right to the continued existence of First River as a natural watercourse at the intake of his conduit. It is not an ownership of the actual water in First River; that "moveable, wandering thing," uncontrolled and unconfined, is subject to the principle "recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control." [1] This mill-owner's water-right in First River is the intangible right to have the stream continue to exist as a whole at the intake of his conduit, and not an ownership of any individual water.

The place where he first begins actually to own water as such is possibly where water has entered his conduits on its way over the

[1] Sweet *v.* City of Syracuse, 129 N. Y. 316, 335, 27 N. E. 1081, 1084 (1891).

divide to the mill. After entering, it is no longer moving at large as it did while in the stream; it is moving in his conduits as he directs and governs it, continuing so while passing through the conduit over the divide and through the mill. But under ordinary circumstances, when the water leaves the mill wheels, the mill-owner's rights extend no further down. His right of flow has been completed by receiving the water at his place of use, and at the same time his hold upon the specific water in his structures has come to an end as the water leaves the tail-race into Second River. "If a body of water runs out of my pond into another man's, I have no right to reclaim it." [2]

He still has the ownership of the right to the flow of First River to the intake of his conduit, and, it may be, the ownership of such specific water as is actually passing through his works, but the water that has left the mill and has gone down Second River is again neither his property nor anyone's. It is, however, affected by the important consideration that its continued going is not of natural but is of artificial cause; it is not a natural body of water, nor a natural formation; its existence as a whole depends upon the action of this man.

II

It is from this consideration, and not from ownership of any water as such, that a question first arises between him and lower claimants upon Second River. As a result he is, for the most part, under no obligation to them to continue to maintain the flow.

At any time or in any manner he pleases he may act upon the water at a point above where it leaves his control, although the result is to stop the flow into Second River. He may be in the situation in this respect of having a right as to lower parties to have the water drain down Second River, without right in them to have him continue exercising his right, just as a right-of-way over another's land is no evidence that the party entitled thereto is under duty to walk. Receiving a Christmas present of a thousand dollars for twenty years gives the recipient no vested right to a thousand dollars every Christmas forever, even if he has learned to live in expectation of it. (However harsh it may be from a moral

[2] 2 BL. COM. 14–18.

point of view to cut him off after long continuance, yet the law and morals are different forums.) Maintaining for years a pump which leaked water onto a neighbor's land, creates no duty that the pump must go on leaking. The mill-owner may cease to operate his conduit across the divide, or may cease to operate his mill, or his water wheels, or may change his location, or otherwise take away or alter, in whatever way he pleases, the artificial source of the flow into Second River. This principle is well settled in the decisions. In discussing them, the restricted point so far considered must be carried in mind, *viz.*, the negative act of ceasing to keep up the addition to Second River. The discussion has not yet reached the affirmative act of maintaining the flow and then interfering with it, but only the negative act of no longer maintaining any flow at all; and it will be found that the authorities confine their rulings in the same way. They are cases where the creator of the additional flow acted upon the addition at its source, or while still within his land, and at a point above where it leaves his control.

Among the authorities there is a general proposition that use at a lower point of flow can give rise to no prescriptive right against upper parties. Where, for example, for many years a riparian owner has allowed water to flow by unused, and thereafter he begins to take it upon his own riparian land, the courts permit him at common law, although it stops the flow to others who had been taking it out of the watershed for non-riparian use; the ground being that if such lower parties have used the water in the meantime, it was no invasion of any right of his, and as he could not have sued those below him for using it nor make them stop using it, the latter can acquire no right by prescription against him.[3] The act is done by him at the source or *situs* of his right, before the water gets by him, and is permitted.

With still more strength is this ruled where the flow has an artificial origin (as in the case of the mill now considered). The leading cases are English decisions, the best known being *Arkwright* v.

[3] Stockport W. W. Co. *v.* Potter, 3 Hurl. & C. 300 (1864); Lakeside Ditch Co. *v.* Crane, 80 Cal. 181, 22 Pac. 76 (1889); Hargrave *v.* Cook, 108 Cal. 72, 41 Pac. 18 (1895); Cave *v.* Tyler, 133 Cal. 566, 65 Pac. 1089 (1901); Perry *v.* Calkins, 159 Cal. 175, 113 Pac. 136 (1911); Miller *v.* Enterprise, etc. Co., 147 Pac. 567 (Cal.) (1915).

Gell.[4] In this case a tunnel had been built to drain a mine, and water from the tunnel came to plaintiffs for over a century and was used by them to work some mills. The mine-owners, in order to drain their mine deeper, now dug a lower tunnel which dried up the former one. No right of plaintiffs, it was held, was infringed thereby. The court held:

"But the use of the water [by plaintiffs] in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Slough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not 'of right'; they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel." [5]

In this case the stoppage was done at the source upon defendants' lands — a new tunnel in their own mines; there was no such question as their going a mile below their mines and taking water flowing out of the old tunnel. They did not touch any flow coming from the old tunnel; on the contrary, there ceased to be any flow coming from the old tunnel. This case was followed by a similar English mine-drainage decision.[6] In another English case [7] mine-water was emptied through a launder, to which launder plaintiff connected his ditch just below the boundary of the mine-owner's land. Later the mine-owner on his own land removed his launder and diverted the mine-water so that it no longer entered the ditch of plaintiff, and it was held that plaintiff had no cause of action against the mine-owner, as the mine-owner was acting upon the water on his own land while still within his control. In an early Scotch case, Mr. E. owned a mill receiving water from some lakes. The water from the mill descended to a river on which there were many other mills, being the only water to enter that river from those lakes. This had lasted a long time, when Mr. E. began a project to turn the water of the lakes into a different river. Although Lord Kames, in reporting the case, says that the proprietors of

[4] 5 Mee. & W. 203 (1839). [5] *Ibid.*, p. 233.
[6] Wood *v.* Waud, 3 Exch. 748 (1849).
[7] Gaved *v.* Martyn, 19 C. B. N. S. 732 (1865).

many mills who would thus lose the water "took the alarm," his report of the case shows that Mr. E. took the judgment.[8]

Elsewhere similar rulings have been made. In one case[9] the Blue Point Mining Company brought water in a flume to its mines. After it was discharged there, other parties caught it in lower flumes (Cheek and Ackley and Side Hill flumes). Several years later the Blue Point Mining Company extended its own flume, cutting out the other parties. This was a change of flow while still within its control, and the lower parties had no cause of action. The court said:

"If those owning and working the mining ground elected to abandon their property at a particular point and for a particular length of time, it did not therefore become obligatory upon them to continue to do so, even though the flume companies, encouraged by the circumstances of abandonment for a time, had incurred the expense of constructing the flumes for the purpose of obtaining a profit from the water and earth so abandoned. When the Cheek and Ackley and the Side Hill flumes were constructed, their owners assumed the risk of loss by the miners ceasing to abandon the water and tailings from their mining grounds, and they cannot justly complain because the Blue Point Mining Company adopts means by which it may obtain the full benefit of its mining enterprise." [10]

In a more recent case,[11] for thirty years a riparian owner, after using water for irrigation, had allowed the waste to flow into a ditch of his neighbor, who had no right in the stream itself and got only this waste-water; and it was held that the upper party, the riparian owner, could change the course of his ditch on his own land, although no water thereafter went into plaintiff's ditch.

In other courts similar rulings have been made; and, to sum up the decisions, it may be said that: (1) the ruling is especially well settled in mine-drainage cases, where the mine-owner changes the drain-flow in the mine, or at the mouth of the tunnel, or at some other place within his own boundary;[12] (2) it is also applied to

[8] Magistrates of Linlithgow, *contra* Elphinstone of Cumbernauld, 3 Kames (Scotch) 331 (1768).

[9] Dougherty *v.* Creary, 30 Cal. 290 (1866).

[10] *Ibid.*, p. 299. Correa *v.* Frietas, 42 Cal. 339 (1871) is a similar case.

[11] Davis *v.* Martin, 157 Cal. 657, 108 Pac. 866 (1910). See Dannenbrink *v.* Burger, 23 Cal. App. 587, 138 Pac. 751 (1913), setting forth the general doctrine.

[12] Arkwright *v.* Gell, 5 Mee. & W. 203 (1839) (flow stopped underground); Wood *v.*

water draining from an irrigated field by seepage, where the owner of the field changes the drain-flow on his own land, or above where the water passes his boundary line; [13] and (3) it is applied to water brought from a stream and discharged in a foreign locality at the end of a canal or flume, where the canal-owner stops or changes the location of his canal above the point where it leaves his control.[14]

III

The authorities thus far are clear that the party and his privies having the conduit over the divide, as the creator of the artificial flow into Second River, may ordinarily stop it or take away the source of the flow, if he does so at a point above where the water leaves his land or his mill or the end of his tail-race.

But these authorities did not go further than that; and, moreover, there are decisions under which even the above limited extent of the rule has possible exceptions. One is where he stops it only wantonly to harm some lower party on Second River without other object [15] (whereby the law is beginning to infringe upon the distinction between law and morals). The other possible excep-

Waud, 3 Exch. 748 (1849); Gaved *v.* Martyn, 19 C. B. N. S. 732 (1865) (flow stopped below tunnel, but before it left mine-owner's flume, and while still on his land); Broadbent *v.* Ramsbotham, 11 Exch. 602 (1856) (water overflowing from a well); Burrows *v.* Lang, L. R. [1901] 2 Ch. 502; Crescent, etc. Co. *v.* Silver King, etc. Co., 17 Utah 444, 54 Pac. 244 (1898) (flow diverted by tunnel-owner at the tunnel-mouth on his own land); Cardelli *v.* Comstock T. Co., 26 Nev. 284, 66 Pac. 950 (1901) (place and manner of stopping flow not stated, except that the tunnel company "owns land from the mouth of the tunnel to the Carson River, over which the waters from the tunnel flow into said river," and appears to have retaken it before it reached the river). See Chandler *v.* Utah Copper Co., 43 Utah 479, 135 Pac. 106 (1913).

[13] Burkart *v.* Meiberg, 37 Colo. 187, 86 Pac. 98 (1906); Roberts *v.* Gribble, 43 Utah 411, 134 Pac. 1014 (1913); Garns *v.* Rollins, 41 Utah 260, 272, 125 Pac. 867, 872 (1912). In this case the court says: "The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow." See also 43 Land Dec. 321.

[14] Dougherty *v.* Creary, 30 Cal. 290 (1866); Correa *v.* Frietas, 42 Cal. 339 (1871); Davis *v.* Martin, 157 Cal. 657, 108 Pac. 866 (1910); Green Valley Co. *v.* Schneider, 50 Colo. 606, 115 Pac. 705 (1911); Staffordshire, etc. Canal *v.* Birmingham Canal, L. R. 1 H. L. 254 (1866).

[15] Green Valley Co. *v.* Schneider, 50 Colo. 606, 115 Pac. 706 (1911); especially where the water originates in drainage, Katz *v.* Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903).

tion is where the artificial flow has continued for a very long time. In the English cases, and occasionally elsewhere, artificial flows of water are found whose beginning is buried so deep in the past that all evidence is lost of the circumstances under which they arose, and it is held that parties creating them are presumed to have agreed that they shall not be stopped.[16] This is sometimes extended to cases where the lapse of time has not been so extreme, but has exceeded the period of the Statute of Limitations.[17]

Yet the authorities are not decisive, either, that the period of the Statute of Limitations need be covered. Although that period is taken as a general guide, yet the demands of justice in the individual case may be looked to as in any case of dedication of property to the public, and application of the principle withheld though the prescriptive period has been exceeded (as in the cases previously considered), or applied though that period has not yet been reached. In the chief case usually cited in this connection,[18] a new channel was artificially cut by defendant for an existing stream. Plaintiff built a saw-mill on the new channel. After eight years defendant attempted to return the water to the old channel, but his acquiescence in use of the new channel by other parties was declared to

[16] Whitmores *v.* Stanford, [1909] 1 Ch. 427 (250 years); Baily *v.* Clark, [1902] 1 Ch. 649; City of Reading *v.* Althouse, 93 Pa. St. 400, 405 (1880). In this case the court says: "Its origin is literally buried in the shades of the past; hence, for all practical purposes, it is a natural watercourse."

[17] (When) "the use of the (artificially, from a foreign source) augmented volume of water has been enjoyed beyond the prescriptive period by an inferior owner, the right to redivert will be lost, and the inferior heritor can insist on the continuance of the flow to which he has been accustomed." FERGUSON, THE LAW OF WATER IN SCOTLAND, 232.

A decision in the state of Washington was as follows: Defendant diverted the water from a spring and carried it into another watershed (Gilmore Creek) in order to drain the land at the spring. Plaintiff, a riparian owner on Gilmore Creek, used the water and became dependent thereon for domestic use. After thirty years, the defendant on his own land at the spring diverted the water elsewhere for his own use, and was enjoined. The court said that the proprietor of a stream, by diverting it into an artificial channel and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped, as against a person making a beneficial use of the water, from returning it to its natural channel to that person's loss and injury; that the user does not have to show a prescriptive right in himself to secure this relief. Hollett *v.* Davis, 54 Wash. 326, 103 Pac. 426 (1909). See also Hough *v.* Porter, 51 Ore. 318, 412–16, 98 Pac. 1083, 1100–1101 (1909); Pacific Livestock Co. *v.* Davis, 60 Ore. 258, 119 Pac. 147 (1911); Falcon *v.* Boyer, 157 Ia. 745, 142 N. W. 427 (1913); Cloyes *v.* Middlebury, etc. Co., 80 Vt. 109, 66 Atl. 1039 (1907).

[18] Ford *v.* Whitlock, 27 Vt. 265 (1855) per Redfield, C. J.

amount to a public dedication of it. Judge Redfield said that defendant "is bound to the same extent and in as short a period, as if he alters the fence upon a highway or common, and thereby gives privileges to the public. He cannot often recall them after the shortest period. Any time is sufficient which satisfies the jury that the public were justified in treating it as a permanent dedication." [19]

The cases laying down this limitation were of water with a natural flow, only the new channel being artificial; a winding stream was shortened by a cut between the bends, or the like; the nature and purpose of the new flow were inherently permanent. Where both the new channel and the source of the additional flow into Second River are artificial and inherently temporary in nature and purpose, as in the case of mine-drainage, the authorities cited in the beginning establish that this limitation is inapplicable.

It appears, from the above, that this limitation is not a broad one. The general rule is certainly with the owner stopping his power house and ending the flow into Second River. The restriction upon the ground of "dedication" applies only to minglings inherently permanent in nature and purpose. That a given case is of that kind will usually be hard to say in practice; moreover the authorities have not settled upon the length of time required to bring the dedication about.

IV

Passing on, we come to where he allows the artificial flow into Second River to continue beyond his borders, and then reënters upon Second River at a lower point, claiming that as he brought the water in he may go below and take it out again, and to this we shall now proceed. It is distinguished from the former discussion in that it assumes continuance of the flow from the power house

[19] *Ibid.*, p. 268. Similar cases have held that, under such circumstances, defendant could not restore the stream to its old channel any more where it would flood those who had gone upon the old dry channel and cultivated it, just as the other cases held that the flow could not be stopped to the detriment of those on the new channel who had come to use it. Woodbury *v.* Short, 17 Vt. 387 (1845); Shepardson *v.* Perkins, 58 N. H. 354 (1878); Matheson *v.* Ward, 24 Wash. 407, 64 Pac. 520 (1901); Stimson *v.* Inhabitants of Brookline, 197 Mass. 568, 83 N. E. 893 (1908); Ranney *v.* St. Louis, etc. R. R. Co. 137 Mo. App. 537, 119 S. W. 484 (1909).

into Second River, whereas the former involved the cessation of any flow from there.

His rights at the mill are already noted to be an interest in the actual water, as such, confined in his conduits, and a "water-right" in First River to have that river flow as the source of supply for his mill. As the actual water, as such, passes out of confinement at his tail-race, and discharges from his mill into Second River, any property he may possibly have had in individual particles of water ceases because his hold thereon ceases. If, therefore, he has any right to retake the water at a lower point on Second River, it cannot be as an owner of any specific water itself; and it is equally well settled that under ordinary circumstances it cannot be as owner of a water-right in First River, for his "water-right" (right of flow) stops at the outlet from the mill, where it has been enjoyed and completed. It does not extend for him down into Second River; he cannot under ordinary circumstances claim that because he had the right to have water come to his mill, therefore he has the right to have it flow from his mill on to the sea and prevent everyone from taking it. He may stop it above the point where it gets out of his control, but he cannot ordinarily let it get away from him and then go below that point and retake it from others.

The law of this under ordinary circumstances is illustrated by a case [20] where defendants brought water from foreign sources (Grizzly Canyon and Bloody Run) to supply miners in another watershed (Cherokee Corral), and, after use at the mines, the waste-water ran down and found its way into Shady Creek, where plaintiffs were located and used it. Some time later defendants, having found a use for their waste-water, went upon Shady Creek and withdrew it above plaintiffs.

"The defence was based upon the fact, that defendants having by their works added to the quantity of water in Shady Creek, they had a right to withdraw a like quantity of water for their own use; and this was the question in issue." [21]

In ruling against them the court says:

"When the water of Grizzly Canyon and Bloody Run left the possession of defendants at Cherokee Corral, all right to, and interest in, that

[20] Eddy *v.* Simpson, 3 Cal. 249 (1853).

[21] *Ibid.*, p. 250.

water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady Creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them." [22]

The situation was a common one in the pioneer mining operations in California, and this case was soon followed by another to the same effect. Defendants, having brought foreign water into Alder Creek, built a dam there by which they used it in mining. From this dam there was a large escape of water, to catch which they built a second dam below. This also leaked, and they meant to build a third dam still lower down to catch the leakage from the second dam, so that none of the water brought in should get by them; but before they had it started other miners (plaintiffs) built a dam half a mile below. A year later, defendants built their third dam between their second one and plaintiffs', cutting off the waste which plaintiffs had been getting from the second dam. (It was water originally from a foreign source in another watershed.) In enjoining defendants' third dam the court held:

"The principle, as laid down in *Eddy* v. *Simpson* [*supra*], must govern this case. The design of the defendants, two years before, to appropriate Alder Creek as a connecting link of their enterprise, could not give them exclusive rights until it was executed, because it is not the intention to possess, but the actual possession, which gives the right. . . . Until they built a dam below, in order to make a further appropriation, any one else had the right to do so." [23]

These cases were followed by another giving a very clear and excellent illustration of the principle. A water company, at the end of its system of conduits, discharged its waste into a gulch where the plaintiffs, unconnected with the company, took it and used it. Some years later the water company "leased" to defendants the right to go to the gulch and take out the water above the plaintiffs. (The "lease" made the case the same as though the water company had gone there to take it out itself.) The defendants were enjoined in a decision in which the law is stated with exceptional clearness.[24]

[22] Eddy *v.* Simpson, 3 Cal. 252, 349 (1853).
[23] Kelly *v.* Natoma Water Co., 6 Cal. 105, 108 (1856).
[24] Schulz *v.* Sweeny, 19 Nev. 359, 11 Pac. 253 (1886).

In another case[25] after defendant had been discharging foreign water into a creek for several years, he tapped the creek between the point of discharge and plaintiff's point of diversion, and it was held that, there being nothing to take the case out of the general rule, the injunction would be granted.[26]

More authorities could be cited,[27] and the general rule is clear that while the person bringing the water from First River may stop the water above the point where it leaves his control, yet he cannot ordinarily let it go by and then retake it below that point from parties on Second River, so long as the going by continues. There is an exception to the rule also, however, to which attention may now be given.

V

The exception is where the recapture of the water by the person bringing it from First River is a part of his original project, and the foreign water was from the beginning turned by him into Second River not simply to get rid of a discharge, but for the express purpose of taking it out again below. If the enrichment by him of Second River and his retaking water from it at a lower point can be shown to be one entire project at the beginning, he had the privilege of so doing at that time, and this privilege of retaking the water below the point where it is let go is, in such case, in addition to his right always existing of stopping the water above that point.

The exception is a privilege of the party bringing the water in, to be exercised by him at such lower point as his original plan contemplated. While the actual water immediately upon leaving the power house has been lost to his possession, yet, by this exception, the right of flow which existed from First River to the power house is extended to a lower point; not a preservation of any right in the water itself, but a privilege, in recognition of bringing the additional water there with such intent, of reclaiming an equivalent, indistinguishable amount. In this exceptional case, where the water was brought from First River with that intent, the party so bringing it into Second River may, after his lower

[25] Davis *v.* Gale, 32 Cal. 26 (1867).

[26] See also Dannenbrink *v.* Burger, 23 Cal. App. 587, 138 Pac. 751 (1913); Comstock *v.* Ramsay, 55 Colo. 244, 133 Pac. 1107 (1913).

[27] See the present writer's WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 37.

works are built, either enjoin other claimants from taking it out of Second River between his power house and his lower works, or may successfully defend an action for taking it out at his lower works against others still further down.

The following authorities establish and illustrate the principle. In one case,[28] the first case in its jurisdiction recognizing the privilege, the jury found as a fact that the foreign water turned into Second River by defendants was not abandoned by them, but was turned in for the purpose of being conveyed to their dam at a lower point on Second River, from whence it was afterwards diverted and sold by them, and upon this finding the court upheld the defendants. (The facts upon which the jury based this finding are not stated.) This was followed in a decision [29] lucidly explaining the law involved, and it has since been a leading case thereon. Here a water company was in the business of supplying miners, and made an arrangement with a miner on a certain creek to bring water to the head of the creek and let it run down to him in the creek bed. The turning in and taking out began together; the acts were performed jointly; no time had elapsed in which the water ran there before the lower party began taking it out, but they began concurrently. As described by Judge Field:

"In the case at bar the channel of the South Fork of Jackson Creek is used as a connecting link between Amador County Canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch." [30]

In upholding the defendants, the court recognizes that the identity of the water was lost, but compares the case to commingling of goods of equal value with no wrong intent, and holds that defendants may retake the equivalent of their contribution.[31] In another case thereafter the same court ruled "that if the defendants had brought water from foreign sources, and emptied it into the stream *with the intention of taking it out again*, they had the right to divert

[28] Hoffman *v.* Stone, 7 Cal. 46, 49 (1857).

[29] Butte, etc. Co. *v.* Vaughn, 11 Cal. 143 (1858).

[30] *Ibid.*, p. 151.

[31] The court distinguishes Eddy *v.* Simpson upon the ground that in that case there was no intent to retake the water when the discharge began, but it had been an afterthought.

the quantity thus emptied in, 'less such amount as might be lost by evaporation, and other like causes.'" [32] In another similar case, water was turned into a channel for the sole purpose of taking it out again, and only as a link in a ditch line, and it was upheld.[33] In a similar way the rule has been applied where salvage water was created by the upper party for the express purpose of carrying it away as soon as created. The court held:

"The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by the absorption and evaporation." [34]

Similar rulings are made in other states. In a Colorado case,[35] water from a tunnel was appropriated by a grantee of the tunnel-

[32] Burnett *v.* Whitesides, 15 Cal. 35, 37 (1860).

[33] "At best the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed, unaided by artificial means with which he [the plaintiff] is not connected. If there was a natural watercourse from Deep Creek to Bates' Slough, through which water flowed, say for two months in the year, and say to the amount of one hundred inches, and if the defendant uses the channel of Deep Creek as a portion of its ditch, it will not be restrained from taking its water out of the channel of Deep Creek, unless such taking out diminishes the quantity which would otherwise have flowed by a natural channel into Bates' Slough, and shortens the period of the natural flow; and it will be restrained only as to such quantity and period." Creighton *v.* Kaweah, etc. Co., 67 Cal. 221, 222, 7 Pac. 658, 659 (1885).

[34] Wiggins *v.* Muscupiabe L. & W. Co., 113 Cal. 182, 196, 45 Pac. 160, 164 (1896). This is quoted with approval in a later case (Pomona, etc. Co. *v.* San Antonio, etc. Co., 152 Cal. 618, 93 Pac. 881 (1908) where the salvage was part of the plan from the beginning of the defendants' work and was carried out contemporaneously therewith, no period of non-use having existed. The rule has been enacted in the Civil Code of California, as follows: "The water appropriated may be turned into the channel of another stream and mingled with its water and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished." CIVIL CODE, § 1413. For similar statutes in other jurisdictions, see the present writer's WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 38–40.

[35] Ripley *v.* Park, etc. Co., 40 Colo. 129, 90 Pac. 75 (1907). See also Ironstone Ditch Co. *v.* Ashenfelter, 57 Colo. 31, 140 Pac. 177 (1914); Sorenson *v.* Norell, 24 Colo. App. 470, 135 Pac. 119 (1913).

owner at the mouth of the tunnel as a part of the original tunnel project, and the grantee took the water at the tunnel mouth as soon as completed. He was held to have a better right thereto than other lower appropriators. In a Utah case[36] mine-tunnel water was allowed to enter a stream. A grantee of the mine-owner took it out again at a lower point on the stream for irrigation. Under a finding that this was according to the original intent and that there had been no intent to abandon, the plaintiffs still lower down were held to have no cause of action.[37] In a recent Washington case permitting such recapture,[38] the plan to retake the foreign water was prepared in 1894, even before the foreign water was brought in (in 1897).[39]

The burden appears from the foregoing to be upon the producer of the mingling to prove this intent of recapture as part of his original plan. The proof will depend upon what took place at the organization of the project, — upon whether he can convince the trial judge or jury that retaking the water from a lower point on Second River was part of his original plan. And further, he must prove that he has been diligent in putting his plan of recapture into effect; the additional privilege may be lost by delay. If the privilege were unlimited as to time, it would enable him to shut-out use of augmented Second River by others forever without himself using it, since the privilege is unlimited as to location until exercised and a location selected. An illustration of the necessity of executing the intention within a reasonable time appears in one case [40] already considered, where the parties bringing in this foreign water proved their original intention to retake it all, and yet were held to have lost the right, under the circumstances shown there, in two years. As stated in another early case,[41] the right can be held only "if such intention had existed and been avowed, and afterwards carried out in good faith within a reasonable time, considering all the circumstances." And this principle that the

[36] Herriman Irr. Co. *v.* Keel, 25 Utah 96, 69 Pac. 719 (1902).

[37] The tunnel was built in 1893 (p. 728), and the recapture was begun in 1894, under preparations that had been made when the tunnel was begun in 1892 (p. 727).

[38] Miller *v.* Wheeler, 54 Wash. 429, 103 Pac. 641 (1909).

[39] See also Spaulding *v.* Stone, 46 Mont. 483, 129 Pac. 327 (1912); *In re* Willow Creek, 144 Pac. 505 (Ore.) (1914).

[40] Kelly *v.* Natoma Water Co., 6 Cal. 105, 108 (1856).

[41] Maeris *v.* Bicknell, 7 Cal. 261, 263 (1857).

privilege must be executed within a reasonable time is part of the familiar doctrine for acquiring water-rights by priority of appropriation in jurisdictions where that system prevails.[42]

What is a reasonable time depends upon the circumstances and the difficulties with which he had to contend in completing this part of his project; what can be presented to judge or jury, in whose discretion the decision always lies wherever "reasonableness" is in question. Some basis for comparison may be had by turning back to the decided cases already cited where recapture was involved, and noting the circumstances upon which they were based. In the cases permitting the recapture, it appears that in all but one the turning in and taking out of the water began almost simultaneously. The exception is the Utah case,[43] where less than a year had elapsed (and preparations had begun in advance of the turning-in). In the cases ruling against the recapture, one [44] does not state the time which elapsed, but it could not have been more than a year, in view of the early date of the case; in the next [45] it was two years; in another [46] the length of time is not given but appears to have been several years, and likewise in another.[47]

In the general doctrine of loss of water-rights by non-use (where the law of prior appropriation prevails), the time has sometimes been extended over ten years in special cases, but usually a definite period of time is laid down,[48] it being held in the case just cited that a water-right once acquired by priority of appropriation will cease by non-use for any unreasonable time within five years, but that more than five years is *per se* an unreasonable time. Within five years the burden of proving an abandonment is upon the party asserting it.[49] But after five years the lapse of time is of itself con-

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[42] CAL. CIVIL CODE, §§ 1411, 1416; Merritt *v.* Los Angeles, 162 Cal. 47, 120 Pac. 1064 (1912).

[43] Herriman Irr. Co. *v.* Keel, 25 Utah 96, 69 Pac. 719 (1902).

[44] Eddy *v.* Simpson, 3 Cal. 249 (1853).

[45] Kelly *v.* Natoma Water Co., 6 Cal. 105 (1856).

[46] Davis *v.* Gale, 32 Cal. 26 (1867).

[47] Schulz *v.* Sweeny, 19 Nev. 359, 11 Pac. 253 (1886).

[48] Smith *v.* Hawkins, 110 Cal. 122, 42 Pac. 453 (1895). See the present writer's WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 575–576.

[49] See Partridge *v.* McKinney, 10 Cal. 181, 183 (1858); Utt *v.* Frey, 106 Cal. 392, 39 Pac. 807 (1895); Senior *v.* Anderson, 115 Cal. 496, 503, 504, 47 Pac. 454, 456 (1896); Wood *v.* Etiwanda W. Co., 147 Cal. 228, 81 Pac. 512 (1905); Land *v.* Johnston, 156 Cal. 253, 104 Pac. 449 (1909).

clusive.[50] There is no actual decision applying the limit of five years to loss of the right of recapture, this case having dealt only with completed appropriations later disused; but the courts are likely to apply it to recapture also unless the facts are shown to be exceptional.

This right of recapture below the point of mingling as part of the original project (in the case where the producer of the additional flow intended such recapture from the beginning) is, as already said, exceptional. Such intention usually does not exist, or is an afterthought, or has not been diligently carried out, and the general rule certainly is that while the producer may stop the water above the point of mingling, he cannot let it go by and then retake it, below the mingling point, from other parties on Second River, so long as the mingling continues.

VI

Since (leaving this exception aside) even its producer cannot, below the point of mingling, divert the added water from other parties there, still less can a stranger to him. Among all the rest of the world on Second River the mingled flow follows the usual law of watercourses as a single flow, and it is immaterial between them how that flow came to be. The various persons may be farmers, householders, landowners, irrigators, manufacturers, or the like. When the mingled flow came down, they put it to use. Controversies over it among themselves do not concern the party (or his privies) bringing the water in, who may look on, sure that neither contestant below him will get any when he chooses to stop his mill or remove his conduit, provided he acts above the point of mingling; but no one else can gain anything by asserting the artificial origin of the additional flow.

For riparian proprietors upon lower Second River the mingled flow follows, at common law, the riparian doctrine against all the world except its producer and his privies. Subject to the producer's right to stop the increment above the point of mingling, a riparian proprietor may, at common law, restrain non-riparian use (or excessive riparian use), by any third person, of any of the united flow. No third person will be heard to put himself into the shoes

[50] Smith *v.* Hawkins, 110 Cal. 122, 42 Pac. 453 (1895).

of its producer and say part of it is foreign water; such defendant is but a volunteer, trying to set up what he has had nothing to do with, and what, if done below the point of mingling, could not avail even the producer himself. A frequently cited opinion of Chief Baron Pollock declared with reference to riparian owners on Second River:

"It appears to us to be clear, that, as they have a right to the use of Bowling Beck, as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works; and if the proprietors of the drained lands or of the colliery *augmented the stream by pouring water into it*, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it." [51]

In a previous English case it was likewise ruled that "although those who formed the channel might have a superior right to the plaintiffs," yet between all the rest of the world the law for natural and artificial flows was the same.[52] Goddard lays down the law

[51] Wood *v.* Waud, 3 Exch. 748, 779 (1849). (Italics ours.)

[52] Magor *v.* Chadwich, 11 Ad. & E. 571, 586 (1840), criticised in Wood *v.* Waud for insufficient stress upon the exception saving the producer, and for omitting the further exception that landowners intermediate between the point of discharge and the point of mingling are bound to no servitude of passage for the foreign water down their lands to the point of junction, and may divert it at that stage of its journey before it has mingled. The analogy immediately suggests itself of the law of diffused surface water and of water percolating diffused underground. Just as Chief Baron Pollock ruled in Wood *v.* Waud that until the foreign water actually entered Second River, the intermediate land need not remain a conduit for its passage any more than the power house or mine need remain a water works for its production, so the English rule called diffused surface water a "common enemy" for which lower land need not remain a drain for another's land on which it gathered; and, as to percolating water, any landowner might interfere as he chose, not being obliged to have his land remain a filter to transmit ground water to any neighbor; all of which matters are discussed together in the English cases. In America this law of percolating water is being modified by discountenancing interference with a percolating supply unless for the reasonable use of the interferer's land; the same modification is appearing in the law of diffused surface water; and by analogy it would appear also in this matter and deny either to its producer (see the second paragraph of part III, above) or to any intermediate landowner between the mill discharge and Second River junction, any right to prevent the artificial flow from going into Second River, unless the diversion of it

accordingly, upon the authority of Chief Baron Pollock's opinion in *Wood* v. *Waud*,[53] and this in turn is quoted, for example, in an Illinois case, saying:

"It is quite true the owner of the mill and the other riparian proprietors have no legal right to exact that this water shall be discharged into the river; but when it is discharged into the river, by virtue of the character it then assumes as running water in a natural stream, and their position as lower riparian proprietors, they are lawfully entitled to the same use and benefit to result from it that they are from any other water of the stream." [54]

In the same way, between the various claimants on lower Second River the law of prior appropriation (when it would apply to natural streams) will apply to the mingled flow, giving to the prior appropriator a prior right against all the world except the producer of the artificial addition stopping it above the point of mingling. To natural streams the law of prior appropriation would apply where the riparian law has either been abrogated as a whole (as in Colorado, Wyoming and some other states), or where the contestants voluntarily do not rely upon it (as often occurs in California, although the riparian doctrine is there recognized), or are so circumstanced that they cannot (as where both contestants are carrying the water off of their own riparian lands for use on distant non-riparian lands). In such cases the law of priority would be

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is in the reasonable use of its producer or of such intermediate land. If some lower claimant on Second River may so restrict such intermediate landowner to the reasonable use of his own land, it is the same as a riparian right in respect to such artificial flow, even before its mingling with Second River, against even the intermediate landowners and all the world except the producer of the flow. But be this as it may, after the artificial addition has entered Second River, Lord Campbell's opinion is authority that lower claims on Second River, as riparian rights, then extend to the united flow against all the world except only the producer's (and his privies') right to stop it above the point of mingling.

[53] "When a stream is natural, there can be no doubt that all water which flows into it becomes a part of that stream, and subject to the same natural rights as the rest of the water, and that it makes no difference that the water so flowing to the natural stream was sent down by artificial means." GODDARD, EASEMENTS, 7 ed., 87, citing Wood *v.* Waud. He adds the exception of the producer, saying that "those natural rights cannot attach till the water reaches and becomes part of the natural stream, nor can they hinder the person who gives the supply from stopping it."

[54] Druley *v.* Adam, 102 Ill. 177, 203 (1882); see also p. 197, citing Eddy *v.* Simpson, 3 Cal. 249 (1853). See also Dannenbrink *v.* Burger, 23 Cal. App. 587, 138 Pac. 751 (1913); Comstock *v.* Ramsay, 55 Colo. 244, 133 Pac. 1107 (1913).

applied to natural streams, and in such cases it will likewise govern the contestants upon the mingled flow in Second River among themselves (subject to the paramount right of its producer and his privies to stop the increment above the point of mingling). For example, in a case where someone on Second River sought, on the ground of its artificial origin, to defend an action for diverting part of the mingled flow from another there who was a prior user of it, the court ruled:

"If it should be conceded upon the facts proved that the water stopped and diverted by defendant was the overflow from the People's Ditch into a channel of Outside Creek, and that the People's Ditch Company might have diverted the overflow, this would not authorize defendant to divert it, unless it appeared defendant had acquired the right from the People's Ditch Company." [55]

That priorities (whenever they would be applied to natural streams) may be acquired likewise between various claimants in the use of the mingled flow, valid against all the world except its producer (and subject only to his paramount right to cease supplying it above the point of mingling) follows also from the rulings above given, that the producer himself could not go below the point of mingling to divert it from anyone who has it in use,[56] and is not infrequently laid down by statute.[57]

Claims of such kind between adversaries both subject to a paramount title in a third person frequently occur in the law of waters. They are not freehold rights in the full sense, being at the mercy of the paramount owner — in this case the producer of the artificial part of the flow. Other instances of claims subject to a paramount title are where, on natural streams, two non-riparian owners contend for the water, subject to the right of third persons

[55] Bliss *v.* Kaweah, etc. Co., 65 Cal. 502, 4 Pac. 507 (1884). Similarly, Farmers, etc. Co. *v.* Rio Grande C. Co., 37 Colo. 512, 86 Pac. 1042 (1906), as to water coming into Second River from a mine-tunnel. In Arkwright *v.* Gell, 5 Mee. & W. 203, 233 (1839), laying down that no one on Second River has a right against the producer of the artificial flow, Baron Parke added that "as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired."

[56] Eddy *v.* Simpson, 3 Cal. 249 (1853); Kelly *v.* Natoma Water Co., 6 Cal. 105, 108 (1856); Davis *v.* Gale, 32 Cal. 26 (1867); Schulz *v.* Sweeny, 19 Nev. 359, 11 Pac. 253 (1886).

[57] For example, CAL. STAT. 1913, p. 1012, §§ 15 and 17; LORD'S ORE. LAWS, § 6673. See the present writer's WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 55.

(the riparian owners) to prevent both from taking any; or where two parties seek to store the same flood water, subject to the paramount right of a third person (the landowner upon whose land they occur) to prevent floods gathering there; or where two rival appropriators contend over a ditch upon a third person's land, subject to a paramount right of the third person (the landowner whose land is crossed) to oust both of them. Between the adversaries (subject to the paramount right of the third person, should he assert it) there exists in this way a "possessory right," resting upon the principle, expressed in various ways, that *jus tertii* cannot be set up, or that possession is nine points of the law, or that possession is presumptive title against everyone but the paramount owner. In the mingled flow each riparian owner (except as against the producer of the artificial part of it stopping it above the point of mingling) is possessed, as incident to his riparian estate, of the whole flow, subject to a further exception in every other riparian owner to make a reasonable riparian use of it; in the case where the adversaries claim as rival appropriators by priority, each appropriator is in the same way possessed of so much as he appropriates, subject to no second exception, but only to the exception of the artificial flow's producer. While all receive it as a gratuity, that it is a gratuity can be set up only by him who gives it; among those receiving it, none can invalidate another's interest in it on the ground of its gratuitous existence without in the same breath invalidating any claim he might set up to it himself.

VII

The following would seem to result from the foregoing discussion concerning the rights of the party (and his privies) who brings water from First River, and, after passing it through his works, discharges it into Second River:

(1) He may change the flow of water from his works into Second River or stop it entirely, if he does so above the point where the water leaves his works or the boundary of his land, or above the point of mingling,[58] unless the new condition is inherently permanent and has been suffered by him to continue long enough to

[58] No attempt has been made in this paper to examine into the distinction, if any there be, between the places thus indicated.

raise a dedication thereof to the community (if any) using it below.[59]

(2) He may also in exceptional cases let the water go down Second River and then retake it from others below his works if the intention so to recapture it was part of his original project, and has not been lost by unreasonable delay; but usually such intention does not exist, or is an afterthought or has been lost by delay, so that usually he will have no such right.

(3) While the paramount consideration is that the producer owns and controls the source of supply, yet among all the rest of the world except him and his privies, the mingled flow follows the usual law of watercourses as a single flow, and it is immaterial between them how that flow came to be. Subject to the producer's paramount title, riparian owners on Second River have riparian rights in the mingled flow, and successive appropriators have relative priorities therein, upon the same rules of law that apply for riparian owners or successive appropriators of natural water supplies.

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[59] This is doubtful, and the chance of its application would be still less if he should notify the parties below that no dedication is intended.